MHES Sdn Bhd v Kumpulan Suria Signs Sdn Bhd

HIGH COURT (KUALA TERENGGANU) — CIVIL APPEAL NO R3–12–58 OF 1998
NIK HASHIM J
5 DECEMBER 2001

Contract *— Formation — Condition precedent — Agreement to let out building to plaintiff — Failure to pay security deposit — Whether binding contract existed between parties — Whether payment of security deposit was a precondition of the tenancy contract*

The defendant agreed let a building to the plaintiff on a monthly rental of RM3,500 subject to the terms found in a letter of offer issued by the defendant. The plaintiff paid a sum of RM3,500 to the defendant as booking deposit. The plaintiff was required to pay a sum of RM14,5000 as security deposit on or before 15 April 1991. Under the terms of the letter of offer, the defendant was entitled to forfeit the booking deposit in the event that the plaintiff failed to pay the security deposit by 15 April 1991. The plaintiff failed to pay the security deposit and the defendant returned the booking deposit on 7 May 1991. The plaintiff sued the defendant for damages. The plaintiff argued that it did not pay the security deposit as the defendant did not carry out the repairs as stated in the letter of offer. The sessions court judge ruled that the letter of offer was a binding contract and that the defendant had breached the contract when it returned the booking deposit to the plaintiff. The sessions court judge awarded a sum of RM20,000 as general damages. The defendant appealed.

Held, allowing the defendant's appeal:

(1) There was no binding contract in existence between the plaintiff and the defendant. For a contract to come into existence, the parties must have agreed upon the terms and conditions of the contract. On its true construction, the letter of offer did not constitute a contract binding in law but was only a record of terms which were agreed by the defendant and the plaintiff as the basis for the negotiations of a contract (see pp 558G–H, 559A).

(2) By its terms, the letter of offer granted only an option to the plaintiff to be exercised on or before 15 April 1991 in return for RM3,500 consideration paid by the plaintiff subject to the payment of the security deposit (see p 559A).

(3) The payment of the security deposit was a precondition of the contract for tenancy and as the plaintiff had not paid the amount due, there was no consideration for the contract of tenancy. This was because the letter of offer clearly stated that the plaintiff may only have vacant possession upon full payment of the amount due and the execution of a formal tenancy agreement (see p 559C–D).

(4) Since the plaintiff did not exercise the option in the manner stipulated in the letter of offer, no binding contract came into existence between the defendant and the plaintiff and hence, the plaintiff can have no claim against the defendant. Accordingly, the sessions court judge erred when he found that a binding contract existed between the defendant and the plaintiff based on the letter of offer (see p 559D–E).

(5) The return of the booking fee cannot be considered as an act of breaching the contract by the defendant as the refund was made after the date for paying the security deposit had lapsed (see p 559E).

(6) The sessions court judge erred when he failed to consider that the plaintiff's obligations in the letter of offer were preconditions to the tenancy contract whereas the defendant's obligations were not. Before the defendant's obligations to repair the building arose and became enforceable, the plaintiff had to fulfil the precondition by paying the security deposit on or before 15 April 1991 (see p 559F–G).

(7) The sessions court judge erred when he made the award of damages on the ground that it was a reasonable sum due to the hardship suffered by the plaintiff as a result of the defendant's breach. The law required all damages to be proved. In the instant case, the facts relating to the claim for general damages were not pleaded and no evidence was called by the plaintiff to prove the same (see p 559G–I).

[Bahasa Malaysia summary

Defendan bersetuju untuk menyewakan satu bangunan kepada defendan bagi sewa RM3,500 sebulan tertakluk kepada terma yang didapati dalam surat tawaran yang diisukan oleh defendan. Plaintif telah membayar jumlah wang RM3,500 kepada defendan sebagai deposit tempahan. Plaintif diperlukan untuk membayar jumlah RM14,500 sebagai deposit jaminan pada atau sebelum 15 April 1991. Di bawah terma surat tawaran, defendan mempunyai hak untuk lucut deposit tempahan jika plaitif gagal menjelaskan deposit jaminan pada 15 April 1991. Plaintif gagal untuk membayar deposit jaminan dan defendan mengembalikan deposit tempahan pada 7 Mei 1991. Plaintif menyaman defendan bagi kerugian. Plaintif menghujah beliau tidak membayar deposit jaminan kerana defendan tidak membuat kerja pembaikan seperti yang ditertera dalam surat tawarannya. Hakim mahkamah sesyen memutuskan surat tawaran tersebut sebagai kontrak terikat dan defendan telah memungkiri kontrak apabila beliau mengembalikan deposit tempahan kepada plaintif. Hakim mahkamah sesyen mengawardkan RM20,000 sebagai kerugian am. Defendan merayu.

Diputuskan, membenarkan rayuan defendan: A

(1) Tidak ada kontrak terikat yang wujud di antara plaintif dan defendan. Bagi pengwujudan satu kontrak, pihak-pihak mesti bersetuju kepda terma serta syarat kontrak tersebut. Sebenarnya surat tawaran tidak menjadikan satu kontrak terikat dari segi undang-undang tetapi hanya satu rekod terma yang B dipersetujui oleh defendan dan plaintif atas dasar bagi rundingan satu kontrak (lihat ms 558G–H, 559A).

(2) Mengikut termanya, surat tawaran hanya memberikan satu pilihan kepada plaintif untuk digunakan pada atau sebelum 15 April 1991 sebagai pengembalian bagi RM3,500 balasan C yang dibayar oleh plaintif tertakluk kepda bayaran deposit jaminan (lihat ms 559B).

(3) Pembayaran deposit jaminan adalah prasyarat satu kontrak penyewaan dan oleh kerana plaintif tidak membayar jumlah selebihnya, tiada balasan bagi kontrak penyewaan. Ini adalah kerana surat tawaran dengan jelasnya mengatakan plaintif hanya D dapat pemilikkan kosong setelah bayaran sepenuhnya dan pelaksanaan perjanjian penyewaan rasmi (lihat ms 559C–D).

(4) Oleh kerana plaintif tidak menggunakan pilihan yang distipulasikan dalam surat tawaran, tiada kontrak terikat yang wujud antara defendan dan plaintif, oleh itu, plaintif tidak E mempunyai sebarang tuntutan terhadap defendan. Hakim mahkamah sesyen telah terkhilaf apabila beliau mendapati terdapat kontrak terikat di antara defendan dan plaintif berdasarkan surat tawaran tersebut (lihat ms 559D–E).

(5) Pengembalian yuran tempahan tidak boleh digunakan sebagai F satu tindakan pemungkiran kontrak oleh defendan kerana pengembalian itu dilakukan selepas tarikh luput untuk membayar deposit jaminan (lihat ms 559E).

(6) Hakim mahkamah sesyen telah terkhilaf apabila beliau gagal untuk mengambil kira tanggung jawab plaintif dalam surat tawaran tersebut adalah prasyarat bagi kontrak penyewaan, G sebaliknya tanggung jawab defendan tidak. Sebelum tanggung jawab defendan untuk memperbaiki bangunan tersebut timbul dan boleh dikuatkuasakan, plaintif harus menunaikan prasyarat dengan membayar deposit jaminan pada atau sebelum 15 April 1991 (lihat ms 559F–G). H

(7) Hakim mahkamah sesyen terkhilaf apabila beliau membuat award kerugian atas dasar bahawa ia adalah satu jumlah yang munasabah kerana kesukaran yang dihadapi oleh plaintif sebagai akibat pemungkiran oleh defendan. Undang-undang memerlukan semua kerugian dibuktikan. Di dalam kes ini, fakta yang berkaitan dengan tuntutan bagi kerugian am tidak diplidkan dan tiada I keterangan dipanggil oleh plaintif untuk membuktikan sedemikian (lihat ms 559G–I).]

Notes

For cases on condition precedent, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) para 2751.

Cases referred to

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754 (refd)
Smith v Hughes (1871) LR 6 QB 597 (refd)
Ram Singh v Bright Steel Sdn Bhd [1988] 3 MLJ 33 (refd)

Mohan Singh (*KL Rekhraj*) for the appellants/defendant.
SG Lingam (*SG Lingam & Co*) for the respondent/plaintiff.

Nik Hashim J:

The appeal

This is an appeal by the defendant/appellant against the decision of the learned sessions court judge dated 10 February 1998 in allowing the plaintiff/respondent's claims and awarding a sum of RM20,000 as general damages with interest at the rate of 8%pa from the date of filing to the date of judgment.The plaintiff also filed a cross appeal against the said decision and claimed RM20,000 as general damages.

The facts

Briefly, the facts are that the defendant was the owner of a four storey building bearing the address No 77 Jalan 1/91, Taman Shamelin Perkasa, Cheras, Kuala Lumpur ('the said premises') and had allowed the estate agent Collings Hui Worldwide Sdn Bhd ('the agent') to seek and obtain tenants for the said premises.

The defendant agreed to let the said premises to the plaintiff on a monthly rental of RM3,500 subject to the terms as found in the letter of offer dated 2 April 1991 prepared by the agent and the said letter of offer at pp 54–55 is now reproduced:

> 2nd April 1991
> Kumpulan Suria Sdn. Bhd.
> No 18, Jalan 8/91
> Taman Shamelin Pertama
> Batu $3^1/_2$ Cheras
> 56100 Kuala Lumpur.
>
> Attn: Mr. Mah/CC Lee
>
> Dear Sir
>
> RE: Lease of 4-Storey shophouse No 77, Jalan 1/91, Taman Shamelin Perkasa, $2^1/_2$ Miles, Cheras, K. Lumpur
>
> This is to confirm that you have agreed to lease the above premises on the following terms and conditions:

1	SUBJECT PROPERTY	:	No 77, Jalan 1/91, Taman Shamelin Perkasa, Cheras, Kuala Lumpur. (Whole Building).
2	RENTAL	:	$3,500.00 per month payable monthly in advance.
3	BOOKING DEPOSIT	:	Equivalent to one (1) month's rent or $3,500.00 to be paid on or before 3rd April 1991.
4	SECURITY DEPOSIT	:	Equivalent to three (3) months rent or $14,500.00 to be paid on signing of the Tenancy Agreement which shall be effected on or before 15th April 1991.
5	ADVANCE RENTAL	:	One (1) month's rent
6	UTILITY DEPOSIT	:	$4,000.00 (covering electricity and water). Tenant to apply and pay all deposits to the relevant Authorities for Telephone.
7	RENOVATION FREE PERIOD	:	One and half (1½) months before commencement of lease or from 15th April 1991 to 31st May 1991.
8	PERIOD OF LEASE	:	Three (3) years with an option to renew for another two (2) years on same terms and conditions except for rental which shall be either at prevailing market value or not to exceed a 15% incremental review over the proceeding rental rate, whichever is the lower.
9	VACANT POSSESSION	:	Upon full payment and signing of Tenancy Agreement.
10	COMMENCEMENT OF LEASE	:	1 June 1991
11	STAMP DUTY AND PREPARATION OF TENANCY AGREEMENT	:	To be borne by Tenant. The landlord shall undertake to do the following works for the Tenant, which shall be completed on or before 15th April 1991.

A

12 OTHER CONDITIONS : a) To fix a roller shutter on the ground floor (glass wall) and to install grills at the entrance of all back doors.

b) To replace handrails at the staircase leading to the upper floors.

B

c) To make good and replace rubber strips of windows.

d) To replace Fuse box on all floors.

C

e) To replace missing ceiling board on 3rd floor.

f) To fix/replace all lightings at stairway/corridor.

D

g) To replace all water meter missing at the premises.

The Booking Deposit shall be collected on your behalf and upon your confirmation before your commencement of works as outlined in Clause 12 herein.

E If you are agreeable to the above terms and conditions, the following sum of money shall be due from you and to be paid on or before 15th April 1991 otherwise the booking deposit of $3,500.00 will be forfeited.

Security deposit (3 months)	$10,500
F Advance rental (1 month)	$ 3,500
Utility deposit (Electricity & Water)	$ 4,000
Sub-total	$18,000
G Less booking deposit	$ 3,500
Total amount due from you	$14,500

Kindly confirm on the duplicate copy of this letter that you accept the above terms and conditions and return the same to us.
Thank you.

H

Yours faithfully

HUI WORLDWIDE SDN BHD

I -sd-

.....

We hereby accept the above terms and conditions

-sd-

..... 3.4.91

ANDREW WONG

Senior Manager

Name:

Date:

MHES SDN BHD

-sd-

LOW KEIN KEE

Business Development Manager

The plaintiff paid a sum of RM3,500 as booking deposit and it was a term of the letter of offer that the booking deposit was forfeitable upon failure of the plaintiff to pay the amount due of RM14,500 on or before 15 April 1991.

The tenancy agreement was not signed because the defendant contended that the plaintiff breached the terms of the letter of offer when the plaintiff failed to pay the amount due of RM14,500 and the defendant returned the booking deposit sum of RM3,500 to the plaintiff by letter dated 7 May 1991 at p 57 of record.

The plaintiff on the other hand argued that the plaintiff did not pay the amount due because the defendant did not carry out the repairs as stated in the said letter of offer.

The learned judge in his grounds of decision, ruled that based on the letter of offer a binding contract existed between the defendant and the plaintiff and held that it was the defendant who breached the contract when the defendant returned the booking deposit by letter dated 7 May 1991. Accordingly, the learned judge allowed the plaintiff's claim and awarded a sum of RM20,000 as general damages with interest at the rate of 8%pa from the date of filing to the date of judgment.

The main issue in this appeal was whether there was a binding contract in existence between the defendant and the plaintiff.

Findings of the court

After hearing both parties, I, on 17 December 1998 agreed with the submissions of the learned counsel for the defendant that based on the evidence, there was no binding contract in existence between the parties. I now give my reasons.

For a contract to come into existence, the parties must have agreed upon the terms and conditions of the contract. In *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754, the Supreme Court at p 763 para 1 referred to *Smith v Hughes* (1871) LR 6 QB 597 which said 'it was said that the existence of an agreement depends upon the intention of the parties, and that for there to be an agreement the parties must be ad idem, ie there must be a consensus between them'.

In the present case, on its true construction, the letter of offer did not constitute a contract binding in law but was only a record of terms which were agreed by the defendant and the plaintiff as a basis for the negotiations of a contract. It was an expression in writing of the parties' present intention and willingness to enter into a contract on or before 15 April 1991, if the terms have been complied with. This is clear from cl 4 of the said letter of offer.

By its terms, the letter of offer granted only an option to the plaintiff to be exercised on or before 15 April 1991 in return for RM3,500 consideration paid by the plaintiff subject to the fulfilment of terms of payment of the amount due. The evidence shows that the plaintiff failed to pay the amount due and failed to execute the tenancy agreement and as such the option lapsed after 15 April 1991. The payment of the amount due of RM14,500 is a precondition of the contract for tenancy and as the plaintiff has failed to pay the amount due, there is no consideration for the contract of tenancy. This is because cl 9 of the letter of offer clearly states that the plaintiff may only have vacant possession upon full payment of the amount due and the execution of a formal tenancy agreement. Since the plaintiff did not exercise the option in the manner of terms and conditions of the letter of offer, no binding contract came into existence between the defendant and the plaintiff, and hence, the plaintiff can have no claim against the defendant. Thus, the learned judge erred when he found that there was a binding contract which existed between the defendant and the plaintiff based on the letter of offer. The return of the booking deposit cannot be considered as an act of breaching the contract by the plaintiff as the refund was made on 7 May 1991, a date well after the period for payment of the amount due had lapsed after 15 April 1991.

The learned judge also erred when he failed to take into consideration that the obligations of the plaintiff in the letter of offer are preconditions to the tenancy contract whereas the defendant's obligations are not. Before the obligations of the defendant to repair as provided under cll 11 and 12 arise and become enforceable, the plaintiff has to fulfil the precondition by paying the amount due on or before 15 April 1991 which the plaintiff failed to do. Thus, the defendant's obligations to repair are not to be equalled to the preconditional payment of the amount due by the plaintiff.

Regarding the award of the general damages of RM20,000 to the plaintiff, the learned judge made the award on the ground that it was a reasonable sum due to the hardship suffered by the plaintiff because of the defendant's breach of contract. With respect, the learned judge erred here because the basis of awarding damages in his judgment is not known to the law of contract which requires all damages to be proved (see *Ram Singh v Bright Steel Sdn Bhd* [1988] 3 MLJ 33 (SC)). Further, the facts relating to the claim for general damages were not pleaded and no evidence was called by the plaintiff through the witnesses to prove the same. Hence, the award of the general damages was not right.

Thus, by reasons of the matters aforesaid, I allowed the appeal with costs and the order of the learned judge was set aside. The plaintiff's cross appeal was dismissed.

Defendant's appeal allowed.

Reported by Lim Lee Na